

IN THE COURT OF APPEALS 1/28/97
OF THE
STATE OF MISSISSIPPI
NO. 95-KA-00428 COA

CHRISTOPHER DAVIS

APPELLANT

v.

STATE OF MISSISSIPPI

APPELLEE

THIS OPINION IS NOT DESIGNATED FOR PUBLICATION AND
MAY NOT BE CITED, PURSUANT TO M.R.A.P. 35-B

TRIAL JUDGE: HON. EUGENE M. BOGEN

COURT FROM WHICH APPEALED: LEFLORE COUNTY CIRCUIT COURT

ATTORNEY FOR APPELLANT:

ELIZABETH DAVIS

ATTORNEY FOR APPELLEE:

OFFICE OF THE ATTORNEY GENERAL

BY: W. GLENN WATTS

DISTRICT ATTORNEY: JOYCE I. CHILES

NATURE OF THE CASE: CRIMINAL FELONY

TRIAL COURT DISPOSITION: CONVICTED OF BURGLARY; SENTENCED TO EIGHT
YEARS IN THE MISSISSIPPI DEPARTMENT OF CORRECTIONS

BEFORE THOMAS, P.J., BARBER, AND McMILLIN, JJ.

THOMAS, P.J., FOR THE COURT:

Christopher Davis was convicted of burglary of a dwelling. He appeals, assigning one issue as error:

DID THE TRIAL COURT ERR IN REFUSING TO ALLOW THE DEFENDANT TO IMPEACH THE STATE'S WITNESS WITH A PRIOR CONVICTION?

Finding no error, we affirm.

FACTS

On December 13, 1994, Davis and his half-brother James Lewis Davis (hereinafter "Lewis") burglarized Tommy Everette's home in Leflore County. Lewis pled guilty and testified against his brother at trial. Lewis admitted that he drove the car while Davis committed the burglary. Lewis stated that he helped Davis load a seven millimeter rifle, muzzle loading gun, a bow and arrow, a VCR and a microwave into the car. Davis told Lewis to keep the rifle and muzzle loader.

Tracey Cross testified that he loaned his gray Pontiac to Davis. Emmanuel Gibson testified at trial that he saw Davis and Lewis together in a gray Pontiac on the day of the burglary. He also testified that Lewis approached him shortly thereafter and offered to sell him a seven millimeter rifle for sixty-five dollars. John Sanders testified that Davis brought the Pontiac to him and asked him to take the items in the car to his girlfriend's house. Sanders stated that he took a VCR, microwave oven, stereo, and bow and arrow to Sharon Scott's house.

Davis testified at trial that he was watching television at his aunt's house at the time the burglary occurred and that he merely agreed to buy the VCR, microwave, stereo, and bow and arrow from Lewis. He also testified that he clocked in to work at "straight up 2:00" P.M. Barbara Cross, Davis' cousin, testified that he was watching television at her mother's house until 1:30 P.M. Davis' time sheet from work which indicated that he clocked in at 2:38 P.M. was also admitted into evidence.

ANALYSIS

Prior to trial, Davis filed a motion in limine to exclude any reference to his prior burglary conviction. The State also requested that Lewis' prior conviction for accessory after the fact of armed robbery also be excluded. The trial court granted both motions. Davis now asserts that the trial court erred in denying him the opportunity to impeach Lewis with his prior conviction.

**DID THE TRIAL COURT ERR IN REFUSING TO ALLOW
THE DEFENDANT TO IMPEACH THE STATE'S WITNESS
WITH A PRIOR CONVICTION?**

Davis asserts that the trial court erred in refusing to allow him to impeach Lewis with his prior conviction for accessory after the fact of armed robbery under *Bogard v. State*, 624 So. 2d 1313,

1316-17 (Miss. 1993) and Mississippi Rule of Evidence 609. Rule 609 (a) provides that

[f]or the purpose of attacking the credibility of a witness, evidence that he has been convicted of a crime shall be admitted if elicited . . . during cross-examination but only if the crime (1) was punishable by death or imprisonment of one year . . . and the court determines that the probative value of admitting this evidence outweighs its prejudicial effect on a party or (2) involved dishonesty or false statement, regardless of the punishment.

Davis asserts that the trial court erred under *Bogard* in excluding this testimony; however this case is readily distinguishable from *Bogard*. The offense in *Bogard* was armed robbery. *Bogard*, 624 So. 2d at 1316. Lewis' offense was accessory after the fact to armed robbery. Lewis has failed to cite to any case law allowing the use of a similar conviction. We will review the trial court's ruling on this issue under the law established in *Peterson v. State*, 518 So. 2d 632, 636 (Miss. 1987).

The Mississippi Supreme Court has mandated that Rule 609(a) requires the trial court to make an on-the-record determination that the probative value of the prior conviction outweighs its prejudicial effect before admitting this type of evidence. *Id.* In making this determination, the *Peterson* court identified the following factors as essential to the determination: (1) the impeachment value of the crime; (2) the time of the conviction and the witness' subsequent history; (3) the similarity between the past crime and the charged crime; (4) the importance of the [witness'] testimony; and (5) the centrality of the credibility issue. *Id.*

The record of the hearing is skimpy, at best, and Davis failed to provide information on the age of the conviction. However, because there was little direct evidence other than Lewis' testimony to connect Davis to the actual burglary, Lewis' credibility was central to the State's case. The Supreme Court has not differentiated its analysis of Rule 609 between a defendant and a witness for the State or a witness for the defense. *Id.* Nor does the language of the rule itself differentiate between a defendant and other witnesses. M.R.E. 609.

The *Peterson* Court held that

[t]he importance of [the witness'] credibility to the particular facts of this case weigh in favor of the admissibility of his prior conviction, but only to the extent, if any, that his prior conviction reflects adversely on his credibility.

In this context the prejudicial effect of the similarity of [the witness'] prior conviction and the crime charged is so great that it outweighs the value of the conviction for impeachment purposes.

Peterson, 518 So. 2d at 637. Lewis admitted to his participation in this burglary. This admission of criminal activity certainly provided impeachment material to the defense. Other than allowing the defense to impeach him with his prior conviction, the defense had wide discretion in attacking Lewis' credibility.

Lewis' testimony was extremely important to the State's case because Lewis was the only person able to directly connect his brother to the actual burglary rather than merely possession of stolen

goods. "Rule 609(a)(1) aids in the search for the truth by insuring that important testimony from the [witness] will not be excluded because he fears the prejudicial effect his previous conviction might have on the jury. The importance of [his] testimony weighs against the admissibility of the conviction." *Id.*

The trial court was properly within its discretion in refusing to allow Davis to use the prior conviction to impeach Lewis. There is no merit to this issue.

THE JUDGMENT OF THE LEFLORE COUNTY CIRCUIT COURT OF CONVICTION OF BURGLARY OF A DWELLING AND SENTENCE TO EIGHT YEARS IN THE CUSTODY OF THE MISSISSIPPI DEPARTMENT OF CORRECTIONS IS AFFIRMED. ALL COSTS ARE ASSESSED TO LEFLORE COUNTY.

FRAISER, C.J., BRIDGES, P.J., BARBER, COLEMAN, DIAZ, KING, McMILLIN, PAYNE, AND SOUTHWICK, JJ., CONCUR.